A **ANANTHA KIRUISAN PSR & ANOR**

v.

TEOH CHU THONG

B FEDERAL COURT, PUTRAJAYA
ABDUL HAMID MOHAMAD CJ
ZAKI TUN AZMI PCA
ZULKEFLI MAKINUDIN FCJ
[APPLICATION NO: 08-89-2007 (W)]
C 22 MAY 2008

CIVIL PROCEDURE: *Jurisdiction - Federal Court - Application pursuant to r. 137 Rules of the Federal Court 1995 - Applicants seeking Federal Court order to determine conflicting decisions of Court of Appeal*
D *and Federal Court on statutory years of purchase under s. 28A(2)(d)(i) Civil Law Act 1956 - Issue not raised before trial judge - Whether Federal Court had jurisdiction to determine issue*

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Case originated from sessions court - Whether there was avenue to appeal to*
E *Federal Court - Whether r. 137 Rules of the Federal Court 1995 applicable*

The defendants in a civil case originating from the decision of the Sessions Court applied by way of motion to the Federal Court
F pursuant to r. 137 of the Rules of the Federal Court 1995 ('RFC'), *inter alia*, for the determination of the issue on the statutory years of purchase under s. 28A(2)(d)(i) of the Civil Law Act 1956. The application was made due to the conflicting decisions of the Court of Appeal in *Ibrahim Ismail & Anor v.*
G *Hasnah Puteh Imat* and *Rohani Omar & Anor v. Rohani Said & Anor Appeal* and the Federal Court decisions in *Chan Ching Ming v. Lim Yok Eng* and *Lai Yew Seong v. Chan Kim Sang.*

Held (dismissing the application)
H **Zulkefli Makinudin FCJ delivering the judgment of the court:**

(1) Under s. 96(a) of the Courts of Judicature Act 1967 leave to appeal pursuant to s. 97 of the same can be granted by this court if the case was decided by the High Court in the
I exercise of its original jurisdiction and that too the applicant must show that the decision of the High Court involved a question of general principle decided for the first time or that the case involved a question of importance upon which further

argument and a decision of the Federal Court would be to public advantage. Since the defendants' case originated from the Sessions Court, the avenue for appeal to the Federal Court was closed to the defendants. (para 13)

(2) Rule 137 of the RFC cannot be interpreted to provide another avenue to bring a case originating in the subordinate court to the Federal Court. Cases originating in the sessions court must end at the Court of Appeal. Any injustice or abuse of process of court as alleged by the defendants in the present application could only be corrected by that court as an Apex Court (See the Federal Court cases of *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor*; *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim*). In the circumstances, the Federal Court did not have the jurisdiction to hear the defendants' application. (para 14)

(3) Assuming that the Federal Court had the jurisdiction to hear the application, it would not be appropriate for the Court of Appeal and the Federal Court to deal with the issue on the statutory years of purchase under s. 28A(2)(d)(i) Civil Law Act 1956. The subject matter of the complaint made by the defendants did not relate directly on the issue of the statutory years of purchase but more to the issue on the finding of facts made by the trial judge and the test to be applied in the case of contributory negligence in a motor accident claim. The issue on statutory years of purchase was never an issue before the trial judge. As such, the Federal Court could not determine the said issue raised by the defendants. Counsel acting for applicants in pursuing any matter further to the superior court should be diligent and circumspect in ensuring only issues that arose at the hearing before the trial court are raised. Issues to be dealt with by the superior court should not be brought in through the backdoor. (para 18)

(4) The case of *Lai Yew Seong v. Chan Kim Sang* was distinguishable from the facts of the present case. Further, there was nothing to suggest that the Court of Appeal had taken unto itself the power to overrule a decision of the Federal Court going against the principle of *stare decisis*. The case of *Lai Yew Seong* was not cited in the proceedings before the Court of Appeal. Hence the Court of Appeal had no opportunity to deliberate and express its views over the said issue now raised before the Federal Court. (paras 20 & 21)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Dalam satu kes sivil yang berpunca dari satu keputusan Mahkamah Sesyen, defendan-defendan, melalui satu usul, telah memohon kepada Mahkamah Persekutuan di bawah k. 137 Kaedah-kaedah
B Mahkamah Persekutuan 1995 ('RFC') antara lain supaya diberikan keputusan mengenai pembelian tahun statutori di bawah s. 28A(2)(d)(i) Akta Undang-Undang Sivil 1956. Permohonan dibuat kerana terdapat percanggahan di antara keputusan-keputusan Mahkamah Rayuan di dalam *Ibrahim Ismail & Anor v.*
C *Hasnah Puteh Imat* dan *Rohani Omar & Anor v. Rohani Said & Anor Appeal* dan keputusan-keputusan Mahkamah Persekutuan di dalam *Chan Ching Ming v. Lim Yok Eng* dan *Lai Yew Seong v. Chan Kim Sang*.

D **Diputuskan (menolak permohonan)**
Zulkefli Ahmad Makinudin HMP menyampaikan penghakiman mahkamah:

(1) Di bawah s. 96(a) Akta Mahkamah Kehakiman 1964, kebenaran untuk merayu di bawah s. 97 Akta tersebut boleh
E diberi oleh mahkamah ini jika kes diputuskan oleh Mahkamah Tinggi dalam pelaksanaan bidangkuasa asalnya, dan itupun pemohon mesti membuktikan bahawa keputusan Mahkamah Tinggi tersebut menyangkuti persoalan yang melibatkan prinsip am yang diputus buat kali pertama atau satu persoalan penting
F di mana hujah-hujah lanjut tentangnya serta keputusan oleh Mahkamah Persekutuan adalah untuk kepentingan awam. Oleh kerana kes defendan-defendan berasal dari Mahkamah Sesyen, maka pintu rayuan ke Mahkamah Persekutuan adalah tertutup bagi defendan-defendan.

G

(2) Kaedah 137 RFC tidak boleh ditafsir sebagai memberi ruang tambahan untuk membawa kes yang berasal dari mahkamah bawahan ke Mahkamah Persekutuan. Kes-kes yang berasal dari Mahkamah Sesyen mesti berakhir di Mahkamah Rayuan.
H Sebarang ketidakadilan atau salah guna proses mahkamah seperti yang didakwa oleh defendan-defendan dalam permohonan di sini hanya boleh diperbetulkan oleh Mahkamah Rayuan selaku mahkamah tertinggi. (Lihat kes-kes Mahkamah Persekutuan *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor*;
I *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim*). Oleh yang demikian, Mahkamah Persekutuan tidak berbidangkuasa untuk mendengar permohonan defendan-defendan.

(3) Diandaikan Mahkamah Persekutuan mempunyai bidangkuasa untuk mendengar permohonan, ianya masih tidak wajar bagi Mahkamah Rayuan dan Mahkamah Persekutuan untuk menangani isu berhubung pembelian tahun statutori di bawah s. 28A(2)(d)(i) Akta Undang-Undang Sivil 1956. Halperkara aduan yang dibuat oleh defendan-defendan tidak secara langsung berkaitan dengan isu pembelian tahun statutori tetapi lebih kepada isu dapatan fakta yang dibuat oleh hakim bicara dan ujian yang harus digunapakai untuk kes sumbangan kecuaian di dalam tuntutan kemalangan kereta. Isu pembelian tahun statutori tidak berbangkit di hadapan hakim bicara, dan oleh yang demikian Mahkamah Persekutuan tidak boleh memutuskan isu yang dibangkitkan defendan-defendan tersebut. Peguam pemohon-pemohon, dalam melanjutkan perkara ke mahkamah atasan, harus lebih teliti dan berhati-hati bagi mempastikan hanya isu-isu yang berbangkit semasa perbicaraan di mahkamah bicara sahaja yang dikemukakan. Isu-isu yang mahu ditangani oleh mahkamah atasan tidak harus dibawa melalui pintu belakang.

(4) Kes *Lai Yew Seong v. Chan Kim Sang* boleh dibeza dari fakta-fakta kes semasa. Selain itu, tiada suatu pun yang menunjukkan bahawa Mahkamah Rayuan berhasrat untuk menolak keputusan Mahkamah Persekutuan dengan cara yang melanggar prinsip *stare decisis*. Kes *Lai Yew Seong* tidak dikemukakan di prosiding di hadapan Mahkamah Rayuan. Akibatnya, Mahkamah Rayuan tidak berpeluang untuk mengupas dan memberikan pandangannya terhadap isu yang dibangkitkan di hadapan Mahkamah Persekutuan sekarang.

Case(s) referred to:

Abdul Ghaffar Md Amin v. Ibrahim & Anor [2008] 5 CLJ 1 FC ***(refd)***

Brown and Lynn v. Western SMT Co Ltd [1945] SC 31 ***(refd)***

Chan Chin Min & Anor v. Lim Yok Eng (lawful mother of Gan Swee Hock, deceased) [1994] 3 CLJ 687 SC ***(refd)***

Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal [2004] 1 CLJ 797 CA ***(refd)***

Lai Yew Seong v. Chan Kim Sang [1987] 1 CLJ 351; [1987] CLJ (Rep) 151 FC ***(dist)***

Noraini Omar & Anor v. Rohani Said and Another Appeal [2006] 1 CLJ 895 CA ***(refd)***

Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim (Civil Application No: 08-151-2007(N)) ***(refd)***

Tan Sri Eric Chia Eng Hock v. PP [2007] 1 CLJ 565 FC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 28A(2)(d)(i)
Courts of Judicature Act 1964, s. 96(a)
Rules of the Federal Court 1995, r. 137

For the applicants - Dato' R Kamalanathan (Vinod R Kamalanathan with him); M/s Vinod Kamalanathan & Assoc
For the respondent - Nelson Cherian; M/s Shahriza, Varegheese & Chandran

[Appeal from Court of Appeal, Civil Appeal No: W-04-197-2004]

Reported by Usha Thiagarajah

JUDGMENT

Zulkefli Makinudin FCJ:

Introduction

[1] This is an application by way of notice of motion of the applicants originating from an action filed by the respondent in the Civil Suit No. 1-53-780-1997 in the Sessions Court at Kuala Lumpur against the applicants in a personal injury claim arising from a motor vehicle accident. Before the Sessions Court the applicants were the defendants and the respondent was the plaintiff. In this application I shall refer the parties as they were in the Sessions Court. Under this application filed pursuant to r. 137 of the Rules of the Federal Court 1995 ("RFC 1995") the defendants are seeking for an order that:

(1) Leave be granted to file this notice of motion.

(2) That this Apex Court do determine the following issues of law based on its inherent jurisdiction, arising out of a decision of the Court of Appeal namely:

(a) Whether, pursuant to s. 96(a) of the Courts of Judicature Act 1964 ("the Act") the Court of Appeal, being the final appellate court on matters originating from the Sessions Court, can on such a premise, refuse to be bound by a decision of the Federal Court being the highest appellate court in this country.

(b) Whether, pursuant to s. 96(a) of the Act, the Court of Appeal, being the final appellate court on matters originating from the Sessions Court, can on such a premise hold that the decision of the Federal Court is wrong and

thus give a decision, on a point of law, contrary to the decision given by the Federal Court on the same point of law such as in:

(i) *Chan Chin Min & Anor v. Lim Yok Eng (lawful mother of Gan Swee Hock, deceased)* [1994] 3 CLJ 687 where the Federal Court held that although s. 28A(2)(d)(i) of the Civil Law Act 1956 ("CLA 1956") provides for a multiplier of 16 years, yet where appropriate and taking into consideration factors such as the possible marriage of the deceased and the ages of the dependent-parents, the courts can and ought not to fix the years of purchase at 16. However, the Court of Appeal in *Ibrahim bin Ismail & Anor v. Hasnah bte. Puteh Imat & Anor and Another Appeal* [2004] 1 CLJ 797 held that the Federal Court was wrong not to follow the statutory years of purchase of 16 years.

(ii) *Lai Yew Seong v. Chan Kim Sang* [1987] 1 CLJ 351; [1987] CLJ (Rep) 151 FC

The Federal Court held that negligence means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong and that the test of contributory negligence is based entirely on the conduct of the plaintiff.

In the present case where leave is being sought from this Honorable Court, the Court of Appeal never considered the above principle but looked at the conduct of the defendant in deciding the issue of negligence.

(c) Whether the Federal Court in the exercise of its inherent jurisdiction ought to intervene to give a final decision on this issue as to the right of the Court of Appeal to take unto itself the power to overrule a decision of the Federal Court, in stark conflict to the principle of *stare decisis*.

(d) That due to conflicting decisions both of the Court of Appeal and the Federal Court, a decision of the Federal Court would be a guide to practitioners more so where there is a dissenting judgment on this issue by a presiding Judge of a Court of Appeal in *Noraini Omar & Anor v.*

A *Rohani Said and Another Appeal* [2006] 1 CLJ 895 who refused to follow the decision of the Court of Appeal in *Ibrahim bin Ismail & Anor.* and felt bound by the decision of the Federal Court's decision in *Chan Chin Min.*

B **Background Facts**

[2] The relevant background facts of the case leading to the present application by the defendants are as fallows:

[3] The plaintiff filed an action at the Sessions Court, Kuala C Lumpur against the defendants claiming for general and special damages, interest and costs. In his statement of claim the plaintiff states that he was riding his motorcycle ACP 3005 along Jalan Loke Yew, Kuala Lumpur proceeding from the direction of Kuala Lumpur towards the direction of Kajang when the first defendant D driving motor taxi HW 6272 suddenly overtook his motorcycle from behind and encroached into his path and immediately stopped on the road ahead and in his path, causing him to collide into the rear of the said taxi. In his police report made two (2) days after the accident, the plaintiff had also stated that his friend who was also E riding a motorcycle and coming from his rear had informed him that someone had flagged down the first defendant's taxi.

[4] At the hearing before the Sessions Court the investigating officer ("IO") stated that the damages to the motor taxi were as F follows:

(i) Rear left bumper dented;

(ii) Rear left lamp broken;

G (iii) Rear middle bonnet dented.

[5] The IO did not record the damages to the motorcycle in his book. The IO also testified that there was no overhead bridge at the place of accident and that the said road was a busy road. He H also confirmed that no one else had lodged a police report regarding the same accident.

[6] The plaintiff in his evidence testified that the taxi was on his right and that a friend of his had told him that a person had flagged down the motor taxi and it was then that the taxi I encroached into his path. He however did not see the person who allegedly flagged down the taxi. As he fell, his friend overtook him to chase the first defendant's taxi. The plaintiff said that the said

friend died in 1997 but no death certificate was produced nor any witness called to confirm his death. In his police report made two (2) days after the accident the plaintiff said that the first defendant took him to hospital.

[7] The first defendant denied the plaintiff's version. In his police report lodged about three hours after the accident he said that as he was driving along the said road the plaintiff collided into his rear. The first defendant testified that he was in the left lane and that traffic was heavy. Since the vehicles ahead of him slowed down and as he too slowed down, he heard a sound of collision from the rear. He alighted and saw a motorcycle having fallen. He confirmed that the place of accident was a highway and there was no one along the said road and that he never changed lane. He denied that he was chased by anyone. The plaintiff in his police report had stated that the first defendant took him to hospital. He denied in cross-examination that he was trying to pick a passenger who was ahead of the plaintiff.

Findings Of The Sessions Court

[8] At the conclusion of the trial before the Sessions Court, the learned Sessions Judge held that after analyzing the damages to the motor taxi it was possible to conclude that the plaintiff's motorcycle had collided into the motor taxi at the place where the damages had occurred. The Sessions Court found that the first defendant had suddenly entered into the plaintiff's path and stopped, thus causing the collision. The Sessions Court believed the plaintiff's version and in the circumstances the first defendant was found 100% liable.

Findings Of The High Court

[9] Dissatisfied with the decision of the Sessions Court, the defendants appealed to the High Court. The learned Judicial Commissioner of the High Court after hearing submissions from both parties reversed the decision of the Sessions Court and found the plaintiff totally negligent and thus allowed the appeal. In her written judgment the learned Judicial Commissioner held that there was no evidence suggesting that there was a bystander waving for the taxi to stop, either from the plaintiff or the first defendant and the High Court did not accept the hearsay evidence that a friend of the plaintiff had seen someone waving down the taxi when the plaintiff himself did not see such a person. The High Court also rejected the Sessions Judge's assumption that

just because the taxi was empty, the first defendant must have therefore attempted to pick up a passenger. The High Court also considered the damages to the taxi and thus rejected the plaintiff's version. The High Court held that if the taxi had cut from the right lane and across the plaintiff's path then the collision would have been on the rear right side instead of rear left side. The court disbelieved the plaintiff when he testified that his friend passed him by and was chasing the taxi driver when in his own police report the plaintiff had stated that it was the first defendant who took him to hospital and the learned Sessions Judge never took this factor into consideration.

[10] Based on all the above stated reasons the learned Judicial Commissioner took the view that she ought to intervene and held that the Sessions Court Judge had failed to make a proper overall assessment of the evidence before him.

Findings Of The Court Of Appeal

[11] Dissatisfied with the decision of the High Court the plaintiff appealed to the Court of Appeal which on 10 January 2007 allowed the appeal and restored the order of the Sessions Court given on 26 September 2000. The Court of Appeal in its judgment is of the view that the main issue to be decided in the appeal is whether the High Court was correct in interfering with the Sessions Court's finding of pure fact based on evidential credibility. On this point it would be appropriate to reproduce in full the findings and reasonings of the Court of Appeal as follows:

> The plaintiff's case at first instance was that he was riding his motorcycle along Jalan Loke Yew. He was headed in the direction of Cheras. The defendant who was a taxi driver overtook the plaintiff and obstructed his path. Because of the suddenness of the defendant's movement of his vehicle, the plaintiff ran into the rear of the taxi and was injured. The defendant's version was that he was proceeding along Jalan Loke Yew when the plaintiff suddenly collided into the rear of the former's taxi. There were then two diametrically opposed versions presented to the Sessions Court. The Sessions Court preferred the plaintiff's version and found the defendant solely to blame for the collision. In doing so, the Sessions Court thought it likely that the defendant's taxi must have suddenly pulled up to pick up a passenger from the kerb and that must have accounted for the way in which the vehicle was driven. The Judicial Commissioner who reversed the Sessions Court took the view that as there was no evidence suggesting that there had been any person on the kerb reversed the Sessions Judge.

Now, there was nothing improbable in the plaintiff's story when he said that the defendant taxi had overtaken him and obstructed his path. You will see that sort of thing happening every day in Kuala Lumpur, it is a common occurrence in Kuala Lumpur for a taxi to suddenly pull up to the kerb for the purpose of either picking up a passenger or dropping one off. So the Sessions Court was clearly entitled to suggest that as a probable cause for the way in which the defendant's taxi behaved. This in no way flawed its judgment.

The Judicial Commissioner does appear to have appreciated the role of an appellate court in a case such as this. That role was set out by *Clarke v. Edinburgh Tramways Co.* per Lord Shaw Dunfermline in 1919 SC (HL) 35, 36, where he said:

> When a judge hears and sees witnesses and makes a conclusion or inference with regard to what on balance is the weight of the evidence, that judgment is entitled to great respect, and that quite irrespective of whether the judge makes any observations with regard to credibility or not. I can of course quite understand a Court of Appeal that says that it will not interfere in a case in which the judge has announced as part of his judgment that he believes one set of witnesses, having seen them and heard them, and does not believe another. But that is not the ordinary case of a cause in a court of justice. In courts of justice in the ordinary case things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I – who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case – in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

More recently, *Ryan v. Jarvis* [2005] UKPC 27, an appeal from Antigua & Barbuda Lord Hoffmann stated the appellate practice in this way:

> It is of course most unusual for an appellate tribunal to reverse a trial judge's findings on credibility on the ground that the evidence which he rejected has the ring of truth. The true or false note is generally more audible to the judge who hears and sees the witnesses than to the appellate court reading the record.

So too here. The ring of truth or falsity in the evidence of the witnesses who gave evidence before the Sessions Court would have been more audible to that court than to the Judicial Commissioner who heard the intermediate appeal. Having concluded that the High Court had erred in interfering with the Sessions Court's findings, this Court had no alternative but to allow the appeal and to restore the judgment entered at trial. Other consequential orders that usually follow a successful appeal were made.

Decision

[12] Learned counsel for the defendants at the outset submitted before us that this is the first case where the defendants as applicants have filed a motion before this court in respect of a civil case originating from the decision of the Sessions Court pursuant to r. 137 of the RFC 1995. On this point we need to state the correct position here in that there are already two similar cases filed under Civil Application No. 08-149-2007(P) *Abdul Ghaffar bin Md Amin v. Ibrahim & Anor* [2008] 5 CLJ 1, and Civil Application No. 08-151-2007(N) *Sia Cheng Soon & Anor v. Tengku Ismail bin Tengku Ibrahim* which have both been heard by this court and dismissed on 28 January 2008. We were also enlightened by learned counsel for the defendants that the Federal Court has had the benefit of hearing arguments pursuant to r. 137 of RFC 1995 in respect of a criminal case originating from the decision of the Sessions Court, namely *Tan Sri Eric Chia Eng Hock v. PP* [2007] 1 CLJ 565 FC wherein the Federal Court *inter alia* held that the inherent powers of the Federal Court under r. 137 can be invoked to prevent an injustice or to prevent an abuse of the process of any court where there is no other available remedy. The accused in that case was therefore entitled to pursue his complaint before the Federal Court in the exercise of its inherent jurisdiction under r. 137 and the burden is on him to satisfy this court that the requirement of r. 137 have been complied with.

[13] It is to be noted that under the provision of s. 96(a) of the Act leave to appeal pursuant to s. 97 of the Act can be granted by this court if the case was decided by the High Court in the

exercise of its original jurisdiction and that too the applicant must show that the decision of the High Court involved a question of general principle decided for the first time or that the case involved a question of importance upon which further argument and a decision of the Federal Court, would be to public advantage. Since the case of the defendants originated from the Sessions Court the avenue for appeal is therefore closed to the defendants to come in and present this case before this court. However, the defendants have come before this court by way of an application under r. 137 of RFC 1995. It is relevant to reproduce r. 137 of RFC 1995 which reads:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[14] On the issue of the exercise of power under r. 137 of RFC 1995 for application to review civil matters originating from the Sessions Court as in the present application, I would like to state here that at the time of writing down this judgment I had the benefit of reading the judgment of the Federal Court in the two cases of *Abdul Ghaffar bin Md. Amin v. Ibrahim bin Yusoff & Anor.* and *Sia Cheng Soon & Anor. v. Tengku Ismail bin Tengku Ibrahim* earlier cited. I wholly agree with the conclusions and the reasonings for arriving at those conclusions made by the three members of the bench comprising Abdul Hamid Mohamad, CJ; Zaki Tun Azmi, PCA and Arifin Zakaria, FCJ on this issue in the said two cases. In essence their lordships were of the unanimous view that r. 137 cannot be interpreted to provide another avenue to bring a case originating in the subordinate court to the Federal Court and that cases originating in the Sessions Court must end at the Court of Appeal. Any injustice or abuse of the process of court as alleged by the defendants in the present application could only be corrected by that court as an Apex Court. In the circumstances, I would hold the same view that this court does not have the jurisdiction and power to hear this application by the defendants.

[15] Having taken the view that the Federal Court does not have the jurisdiction and power to hear this application of the defendants, I would nevertheless like to deal briefly with some of the issues raised by learned counsel for the defendants under this

application. I am moved to do so having noted that the factual circumstances relating to the case under the present application as presented by learned counsel for the defendants do not reflect the true factual circumstances at the proceedings in the courts below.

[16] Learned counsel for the defendants in his submission before us and relying on the so called issues of law as framed in the motion filed had strongly attacked the judgment of the Court of Appeal on the premise that the Court of Appeal had taken unto itself the power to overrule the decisions of the Federal Court, in stark conflict to the principle of *stare decisis*. On this point learned counsel for the defendants had referred to us the two Federal Court cases of *Chan Chin Min & Anor. v. Lim Yok Eng* [1994] 3 CLJ 687 and *Lai Yew Seong v. Chan Kim Sang* [1987] 1 CLJ 351; [1987] CLJ (Rep) 151.

[17] In the first case of *Chan Chin Min* the Federal Court held that although s. 28A(2)(d)(i) of the CLA 1956 provides for a multiplier of 16 years, yet where appropriate and taking into consideration factors such as the possible marriage of the deceased and the ages of the dependent-parents the courts can and ought not to fix the years of purchase at 16. Learned counsel for the defendants then referred to us the decision of the Court of Appeal in *Ibrahim bin Ismail & Anor. v. Hasnah bte Puteh Imat & Anor. And Another Appeal* [2004] 1 CLJ 797 wherein the Court of Appeal held that the Federal Court was wrong not to follow the statutory years of purchase of 16 years. Learned counsel for the defendants also referred to us an other-Court of Appeal's case on this same issue of the statutory years of purchase under s. 28A(2)(d)(i) of the CLA 1956 in the case of *Noraini Omar & Anor v. Rohani Said & Anor Appeal* [2006] 1 CLJ 895 whereby in a majority judgment the Court of Appeal again refused to follow the decision of the Federal Court in *Chan Chin Ming*. Due to these conflicting decisions of both the Court of Appeal and the Federal Court, learned counsel for the defendants had impressed upon us that a decision of the Federal Court on this issue given through the present case filed by the defendants would be of a good guide to practitioners.

[18] With respect to the above arguments made by learned counsel for the defendants, I do not think it would be appropriate for the Court of Appeal and this court assuming it had the jurisdiction and power to hear this application to deal with the said issue of statutory years of purchase under s. 28A(2)(d)(i) of

the CLA 1956. This is because looking at the records of the proceedings in the courts below the subject matter of the complaint made by the defendants therein does not relate directly on the issue of statutory years of purchase, but more to the issue on the finding of facts made by the trial judge and the test to be applied in the case of contributory negligence in a motor accident claim. The issue on statutory years of purchase was never an issue to be decided before the trial judge. For this reason I am of the view this court and for that matter even the Court of Appeal which heard the appeal would have declined to answer this particular issue raised by learned counsel for the defendants. The point to be made here is that counsels acting for applicants in pursuing any matter further to the Superior Court should be diligent and circumspect in ensuring only issues that had arisen at the hearing before the trial court be raised and not bringing in issues to be dealt with by the Superior Court through the backdoor way.

[19] As regards the second case of *Lai Yew Seong v. Chan Kim Sang (supra)* referred to us by learned counsel for the defendants, again learned counsel for the defendants has alleged that the principles of law laid down in the said case had not been followed by the Court of Appeal in the present case. In the case of *Lai Yew Seong* it was a case of rear collision. The plaintiff motorcyclist had collided into the rear of a stationary car that had intended to turn across the path of an oncoming lorry. The car had stopped to let the lorry pass. The plaintiff's friend who was riding a motorcycle passed the car on the left whilst the plaintiff collided into the rear right of the said car. The trial judge found the plaintiff 2/3 liable and the defendant 1/3 liable. The defendant appealed against this finding and contended *inter alia*, that the trial judge had failed to appreciate the general duty of a motor vehicle which is following another vehicle. The then Supreme Court quoted the judgment of Lord Justice Clerk Cooper in *Brown and Lynn v. Western* SMT Co Ltd [1945] SC 31 and said as follows:

> The conduct of the leading driver will, of course, have an important bearing upon liability for an accident in every case in which the conduct of both drivers is put in issue, either by a plea of contributory negligence or by double allegations of fault. But the duty of the following driver is a continuous duty which persists independently of any actual emergency or of the leading driver's reaction to such emergency and the question whether the following driver has failed in his duty cannot depend upon whether the leading driver has fulfilled his ...

A The Supreme Court therefore allowed the appeal and found the plaintiff totally liable.

[20] I am of the view the facts of the case in *Lai Yew Seong* are clearly distinguishable from the facts of the present case. In the B present case looking at the police report of the defendants, it clearly states that the damages to his motor taxi were at the rear and left side of the taxi. This showed that it is not a rear collision and that the first defendant had blocked the path of travel of the plaintiff. Further, looking at the sketch plan and the key, the point C of impact and the position of the plaintiff and the first defendant's vehicle after the accident respectively marked by the plaintiff were not challenged at all. Therefore it has to be accepted as a fact which clearly shows that the motor taxi must have swerved to his left and blocked the path of travel of the plaintiff. The lanes A-B D as marked on the sketch plan and key is clearly the emergency lane, which is commonly used by motorcyclist. The question of whether the plaintiff was following the motor taxi from the rear is not an issue as the trial judge clearly did not accept the version of the defendants. The issue of the lower courts not following the E principles of law laid down by the Federal Court in the case of *Lai Yew Seong* referred to by the defendants therefore does not arise at all.

[21] I am of the view having perused the findings and reasonings F made by the Court of Appeal in its judgment of this case, there is nothing to suggest that the Court of Appeal had taken unto itself the power to overrule a decision of the Federal Court and going against the principle of *stare decisis*. To be fair to the learned judges of the Court of Appeal and the learned Sessions Judge it is to be G noted that the case of *Lai Yew Seong* was never cited in the proceedings before them and hence they could not have the opportunity to deliberate and express their views over this issue now raised before us.

[22] For the reasons already stated I would dismiss the motion H with costs.

[23] My learned brothers, Abdul Hamid Mohamad, CJ and Zaki Tun Azmi, PCA, have read this judgment in draft and they have expressed their agreement with it.

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